

Attorneys for Federal Defendants

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SECOND DECLARATION OF PATRICIA A. KURKUL

I, PATRICIA A. KURKUL, declare as follows:

1. I am the Northeast Regional Administrator of the National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce (“NOAA Fisheries”), Gloucester, Massachusetts. In this capacity, I am responsible for the development of policy and the implementation of management programs for the living marine resources of the northeastern United States. I represent the Secretary of Commerce on the New England Fishery Management Council (“Council”) and in other regional activities and am familiar with all activities undertaken by the Council and my staff in preparation and implementation of management measures regarding fisheries of the northeastern United States, including all multispecies (more commonly referred to as “groundfish”) under the Northeast Multispecies Fishery Management Plan (“FMP”). I supervise the personnel in the Region who are charged with the implementation of fishery management plans and who are involved with Council staff in developing and analyzing management measures under the multispecies FMP.

2. The purpose of this declaration is to explain the context and background to the preparation of the report, being submitted to the court, entitled, “Further Consideration and Analysis of the Mixed-Stock Exception to Ending Overfishing and Its Applicability to Framework 42 to the Northeast Multispecies Fishery Management Plan.”

3. The Court’s Order on January 26, 2009 required the defendants in this lawsuit to conduct a review process consisting of a “serious consideration and analysis of the Mixed-Stock Exception.” In footnote 4 to the Order, the court went on to say that, “[t]he New England fishery Management Council shall conduct this review process under the supervision of NMFS and Commerce.” Because neither NMFS nor Commerce “supervise” the New England Fishery Management Council (Council) (see, Defendants’ Memorandum in support of their Motion to Alter or Amend Judgment, pp 4-5, and, the Notice accompanying this declaration), it was determined that the only practical way to comply with the Order, at least in spirit if not the letter

of the Order, was for the Defendants to conduct the review process themselves, prepare a draft report of the conclusions of the review process and present the draft report to the Council for its endorsement. The only meeting scheduled by the Council within the 60-day window in which the court ordered the review process to be completed, was at the Council's meeting scheduled for February 9-11, 2009 (the next scheduled meeting is April 7-9, 2009, which is beyond the 60 day due date). Therefore, I directed my staff to conduct the review process and complete a draft report of its conclusions in time for the Council to review it at its February meeting. The initial version of the draft report was e-mailed to the Council chairman, John Pappalardo and to the Executive Director of the Council, Paul Howard, for their review and comments on February 2, 2009. The Executive Director e-mailed back comments later that day. Taking into account these comments and others from NOAA/NMFS, another draft of the report was prepared. This version of the draft report was sent, on February 4, 2009, to the Council's Executive Director with a request to distribute the draft report to all Council members for discussion at the February Council meeting. The version of the draft that was distributed to the Council for its consideration and endorsement is attached hereto as Attachment A.

5. The Council set aside part of the morning of February 10 for consideration of discussion about the Court Order and the draft report. On that day, Gene Martin, of the Office of General Counsel, NOAA, summarized the contents and conclusions of the draft report and explained that NMFS was requesting an adoption of the draft report by the Council so that it could be submitted to the Court in compliance with the Court Order.

6. At the conclusion of the summary of the draft report, David Preble, Council member from Rhode Island moved "that the Council adopt the draft the analysis of the mixed-stock exception as is analysis under the summary judgment of January 26, 2009." Subsequently, Dr. David Pierce, the Commonwealth of Massachusetts' representative and Deputy Director of the

Division of Marine Fisheries for Massachusetts, moved to substitute the original motion with the following:

that the Council disagree with the conclusions of the NMFS report to the court that the mixed stock exception cannot be applied to the northeast multispecies fishery and request NMFS reconsider its position and make it consistent with congressional intent that: 1) optimum yield should be from the fishery as a whole and; 2) one stock should not dictate severe constraints on the fishery as a whole while that stock is being rebuilt.

7. In introductory comments leading up to his motion, Dr. Pierce indicated that Congressional intent regarding achieving optimum yield and the use of the mixed-stock exception could be found on page 1 of the Magnuson-Stevens Conservation and Management Act as compiled and published by NMFS. See, Attachment B. This page sets out some of the findings by Congress regarding the need for the Act. Dr. Pierce's justification for this motion can be heard by listening to the tape of the meeting found at the Council's website through the following link: <http://www.nefmc.org/actions/index.html>.¹ An extensive discussion was held on this substitute motion. No other specific example of Congressional intent was offered by the Council. Dr. Pierce's motion was eventually passed on an 11-6 vote.

8. Subsequent to the motion passing, the Council discussed whether it should undertake any further analysis of the mixed-stock exception in light of the Court's Order. The Council decided that given time constraints on completing other actions, it would not undertake any further analysis and, instead, should send a letter to NMFS indicating the outcome of the substitute motion. This letter is attached as Attachment C. In the letter, the Council requests that NMFS should consider the motion in finalizing the report required by the Court.

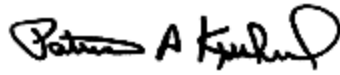
9. Because the Council has indicated that it will not conduct any further analysis of the mixed-stock exception, it was decided that the only way NMFS could fulfill the Order's mandate

¹ To access: a) scroll down to Council Meeting Audio; b) click on the February 9-11, 2009 meeting; c) click on #7 Framework 42 Lawsuit Discussion,; and d) move the control button to just before the halfway point of the taped segment.

for a review of the exception in a timely manner was to revise the draft report taking into account the Council's motion, as requested by the Council in its letter. This revised report is attached as Attachment D.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Gloucester, Massachusetts, on this 19th day of February,
2009.

A handwritten signature in black ink, appearing to read "Patricia A. Kurkul". The signature is stylized with a large initial "P" and a prominent "K".

Patricia A. Kurkul
Regional Administrator, Northeast Region, NMFS